consumers [403] The possibility of welfare enhancing mergers has long been recognized in economics and antitrust literature. For example, the work of McAfee and Williams demonstrates that strict application of the *DOJ/FTC Merger Guidelines* would disallow some welfare enhancing mergers.[404] McAfee and Williams present a model in which, after a merger of independently owned production facilities, the merged firm will run the two facilities to jointly maximize its profits. McAfee and Williams find that mergers that do not create a new largest firm are welfare enhancing. A similar conclusion is found in the work of Froeb, Werden, and Tardiff ("Froeb *et al.*").[405] In their research, which considers mergers in the context of competition by firms producing differentiated products, Froeb *et al.* find that mergers among smaller firms tend to be welfare enhancing, and that mergers that do not create a significant increase in the market share of the largest firm pose little risk of competitive harm. By contrast, the research of Froeb *et al* demonstrates that a merger of the second and third largest firms, which would significantly overtake the largest firm in size, would create welfare harms

195 These results are particularly relevant to competition within local markets for DVP. Each broadcast station tends to deliver a differentiated product, and we have evidence of efficiencies from the ownership of multiple stations in a market. Moreover, in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market.[406] A review of the audience shares of stations in every market with five or more commercial television stations (*i e*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-ranked station.[407] Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the

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[403] Coalition Broadcasters Comments at Attachment A, *Owen Media Ownership Statement* Of course the opportunity cost of viewership is that time could be spent on some other activity, thus an increase in viewership demonstrates an increase in the public's overall value of the programming

[404] R Preston McAfee and Michael Williams, *Horizontal Mergers and Antitrust Policy*, XL J. INDUS. ECON 181-87 (June 1992)

[405] Luke M. Froeb, Gregory J Werden and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries,* Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S Department of Justice (Aug 1993) *See also* Gregory Werden and Luke M Froeb, *The Effects of Mergers in Differentiated Products Industries Logit Demand and Merger Policy,* 10(2) J. L. ECON ORG. 407-16 (1994).

[406] *See* BIA Media Access Database (Mar. 18, 2003).

[407] IPI contends that the use of audience share rank as a metric in evaluating local ownership is "problematic" because ranks vary from quarter to quarter. IPI Comments at 19. In support of this, IPI cites data showing that, over an 18-month period, three different stations occupied the fourth-ranked position in the Los Angeles, California DMA. *Id.* As we explain above, our review of BIA data in over 120 DMAs shows that in over two-thirds of these markets, at least two percentage points separate the fourth and fifth ranked stations. In light of this evidence gathered from our review of a broad range of DMAs, we do not agree that data from a single DMA should dictate whether we rely on audience share rank as a metric for purposes of our local TV ownership rule

fifth and sixth ranked networks each earn a four percent share.[408] While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule.

196 Other persuasive evidence of a separation between top four-ranked stations and other stations includes a study comparing audience shares of stations in ten markets of various sizes.[409] The study finds that the top four-ranked stations control a combined total of at least 75% of each market's audience share.[410] Mergers of stations owned by any of these top four firms would thus often result in a single firm with a significantly larger market share than the others. Our analysis of the top four local stations is related to our analysis of the four leading broadcast networks in connection with the dual network rule There we conclude that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks [411]

197 Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although we believe that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast

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[408] *Nielsen Ratings,* BROADCASTING & CABLE (May 26, 2003) at 11.

[409] *See* UCC Comments in MM Docket No 01-235 at Attachment 3. UCC conducted a study of ten local television markets of various sizes. The UCC study found that in all markets, including the two largest television markets (New York, New York and Los Angeles, California), the top four-ranked television stations control more than 75 percent of the market, measured by viewership over the twelve-month period In four of the markets, the top four stations had more than 90 percent of the market, and in three markets, the top four stations had 100 percent of the market *Id*

[410] *Id*

[411] The local television ownership rule is consistent with a key aspect of our national television ownership rule in recognizing competitive disparities among stations. Our national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while our local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in a market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market Thus, that rule limits mergers of the top four-ranked stations in a market Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed further below. Finally, we note that the top-four merger restriction in our local television ownership rule and the UHF discount in our national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.

transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits[412] Commenters who urge us to permit more same-market combinations focus primarily on the efficiencies and public interest benefits associated with a financially strong station merging with a financially weak station.[413] Such mergers are unlikely to create or enhance market power or to facilitate its exercise. In contrast, no commenter discussed the efficiencies and public interest benefits associated with a merger between two financially strong stations Nothing in the record indicates that such mergers will produce efficiencies that translate into benefits for the viewing public. To the contrary, such mergers are likely to create or enhance market power or to facilitate its exercise. Therefore, by allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, we enable the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

198 One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. In support of its contention that the Commission should eliminate the top four-ranked restriction, Fox submitted an empirical study that compares the local news offerings of top four-ranked stations and other stations in the 210 DMAs.[414] The Fox Top Four Study finds that 668 stations ranked among the top four offer local news[415] We have determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Fox also found that 164 stations ranked outside the top four offer some local news, although this includes stations that do not originate their own news programming.[416] We have determined that there are 854 stations not ranked among the top four. Thus, even including stations that are re-broadcasting the local news of another station, Fox's data show that only 19% of stations outside the top four offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station

199. We also have determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The

[412] *FTC v Heinz*, 246 F 3d 708, 716 (D C Cir. 2001).

[413] NAB proposes a local television ownership rule "that would provide needed financial relief for lower-rated stations (which are particularly struggling financially)." NAB Comments at 70. Coalition Broadcasters provide examples of joint operations involving at least one weak station, with little, or no, local news, and argue that these combinations make it possible for "those struggling stations to survive." Coalition Broadcasters at 15 – 33, and Attachment A at 1 Nexstar argues that without joint operation, many stations in small and mid-sized markets will not survive Nexstar May 16, 2003 Ex Parte at 1.

[414] Fox Comments, Economic Study A, *News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations* (*"Fox Top Four Study"*).

[415] *Id* at 8-14

[416] *Id*

financial position of top four-ranked stations makes the transition to DTV more affordable for these stations [417] Top four-ranked stations also are more likely to have made the transition to DTV than other stations [418] We therefore conclude that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public

200 Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

201 Our decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. We permit this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get smaller.[419] The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets In particular, NAB submitted financial data comparing the average 2002 gross revenues of commercial stations across all DMAs. The data demonstrate that there are fewer stations in smaller DMAs, but as the average number of stations

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[417] NAB submitted data comparing the average cash flow and pre-tax profits of Big Four affiliates and other stations *See* Letter from Jack N Goodman, Senior Vice President and General Counsel, NAB, to Marlene H Dortch, Secretary, FCC (Apr 30, 2003) at 2, Chart 1 ("NAB Apr 30, 2003 Ex Parte"). These data show that, for example, in 2001, Big Four affiliates in the largest markets (*i e*, DMAs 1-25) had an average cash flow of $27,410,975, as compared to just $8,013,317 for stations not affiliated with one of the four major networks. *Id.* The average pre-tax profit of a Big Four affiliate that year was $20,356,967, as compared to only $2,807,447 for other stations in the largest markets. *Id* Because most stations affiliated with the Big Four networks also are top four-ranked stations, we find this data probative of the differences in the financial positions of top four-ranked stations and other stations

[418] As of May 21, 2003, 903 commercial DTV stations were on the air pursuant to a license, program test authority or special temporary authority. Of these stations, approximately 60% were paired with analog stations that were ranked among the top four in terms of audience share as of the most recent sweeps period. *See* BIA Media Access Database (Mar 18, 2003).

[419] For purposes of applying our cross media limits, which are diversity based, we found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by our caps on local television and local radio ownership Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as "large" from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but "small to mid-sized" when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

declines, the reduction in the number of stations is outpaced by the decline in average gross revenue.[420] Thus, small market stations are competing for disproportionately smaller revenues than stations in large markets[421] NAB also submitted data comparing the average pre-tax profits of Big Four network affiliates in DMAs of various sizes[422] These data show that affiliates in the largest markets (*i e* , the top 25 DMAs) had an average pre-tax profit of $20,356,967 in 2001,[423] as compared with an average pre-tax profit of just $1,269,239 among affiliates ranked highest in audience share in the smallest markets (*i.e* , DMAs 151-175).[424] The lowest ranked affiliates in the smallest markets showed negative average pre-tax profits at -$92,917.[425] We find these data probative of the different economics of station ownership depending on market size. The data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets.

202. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. In 1992, the FCC allowed one firm to own a larger percentage of the total radio outlets in smaller markets.[426] In 1996, Congress's local radio caps were built on this same principle In the largest markets, it required six independent station owners, but in the smallest markets, it permitted just two firms to own all the radio stations. The limits we adopt today for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

203. The above discussion illustrates why we must avoid an oversimplified application of the *DOJ/FTC Merger Guidelines*. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that we might lose welfare enhancing efficiency gains by disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, we therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, we further allow a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

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[420] NAB Apr 30, 2003 Ex Parte at 2, Chart 1.

[421] *Id.*

[422] *Id.*, NAB Comments, Small to Medium Markets Statement.

[423] NAB Apr 30, 2003 Ex Parte at 1, 3.

[424] NAB Comments, Small to Medium Markets Statement, Table 6

[425] *Id*

[426] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (finding that competitive realities are substantially different in markets of different sizes)

3. Other Issues

a. Alternate Proposals

(i) Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications

204. A number of commenters urge us to retain the existing rule, or make minor modifications.[427] Children Now proposes that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule.[428] AWRT, AFL-CIO, and AFTRA urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming.[429] Children Now and UCC state that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.[430] As we explained above, we have determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, we disagree with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a "voice test," it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to "count" only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

205. Smith proposes that if we relax the rule, we should prohibit common ownership of more than one station affiliated with a top four network.[431] Our revised rule prohibits common ownership of stations that are among the top four in terms of audience share. Although such stations are often affiliated with top four networks, we conclude that audience share rank is a more accurate measure of market power than network affiliation. Therefore, we do not adopt Smith's proposal to prohibit common ownership of more than one station affiliated with a top four network

206 CFA asserts that while the Commission has ample justification for retaining the current rule, if it chooses to revise the rule, it should apply an "HHI-adjusted voice count" to local TV ownership [432] Under CFA's proposal, the Commission would calculate the market shares of television

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[427] These include AFL-CIO, AFTRA, AWRT, CFA, Children Now, CWA, Smith, Stapleton, and UCC AFL-CIO Comments at ii, 47; AFTRA Comments ¶ 31; CFA Comments at 9, 284, Children Now Comments at ii, 3; CWA Comments at 3, 46; Smith Comments at 3, Stapleton Comments at 15-16; UCC Comments.

[428] Children Now Comments at 3

[429] AWRT Comments at 8, AFL-CIO Comments at 56

[430] Children Now Comments at 3, UCC Comments at 46.

[431] Smith Comments at 3 Smith states that prohibiting combinations of Big Four network affiliates would help preserve existing independent sources of local news.

[432] CFA Comments at 284-85.

broadcast stations in the relevant geographic market, which would be either the DMA or a "weighted average DMA," calculated to account for the fact that certain stations do not have cable carriage throughout the market[433] CFA proposes that the Commission define highly concentrated markets as those with fewer than six equal-sized voices or a four-firm concentration ratio above 60%.[434] Moderately concentrated markets would be those with between six and ten equal-sized voices or a four-firm concentration ratio of 40-60%.[435] CFA urges us to prohibit any combination that would result in a highly concentrated market[436] Where a combination would result in moderate concentration, CFA proposes that we permit the combination only if we find that the merger will serve the public interest and if the owner of the merging stations agrees to retain separate news and editorial departments in different subsidiaries of the merged entity.[437]

207 Our modified local TV ownership rule will ensure that there are at least six firms in significant number of markets (*i.e* , all markets with 12 or more television stations), much like CFA's proposal CFA's proposal does not, however, adequately address record evidence of differences in the economics of broadcast stations in smaller markets. Much like the strict application of the *DOJ/FTC Merger Guidelines* discussed earlier, CFA's proposed test would prohibit certain mergers that will result in welfare enhancing efficiencies Accordingly, we decline to adopt CFA's proposal. With regard to CFA's waiver proposal, we do not agree that conditioning assignments/transfers on retention of separate news departments within separate subsidiaries of a merged entity is necessary to advance our diversity, competition or localism goals Requiring compliance with our rules, rather than conducting case-by-case evaluations or imposing merger conditions, is a more effective way to achieve these goals.

208. Entravision does not take a position on whether the rule should be relaxed, but proposes that if the rule is relaxed, the Commission should require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets.[438] We do not agree with Entravision that modifying the local TV ownership rule will increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct. Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes In addition, an antitrust law violation by a licensee would be considered as part of our character qualifications review in connection with any renewal, assignment, or transfer of a license.

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[433] *Id* at 166-167, 284-85, 289. CFA does not specify whether market shares are to be calculated based on audience share or advertising revenue share

[434] *Id.* at 286

[435] *Id*

[436] *Id*

[437] *Id* at 284-85 Combinations resulting in moderately concentrated markets also would be subject to a *de minimis* exception under which market participants could acquire small firms (*i.e.*, those with a market share of less than 2%) *Id* at 288.

[438] Entravision Comments at 8-10 Entravision makes the same proposals with regard to relaxation of cross-ownership rules. Id These certifications would be required in connection with license renewals, applications for assignment or transfer of control of a license, and at license mid-term when stations' EEO compliance is reviewed

(ii) Proposals to Eliminate or Substantially Modify the Rule

209. Several commenters propose that we eliminate the current rule or substantially modify the rule in order to permit more same-market combinations[439] Among these are a proposal to allow common ownership of two television stations in all markets with four or more stations, a proposal to eliminate the top four-ranked standard, a proposal to eliminate the voice test provision of the rule but to retain the top four-ranked restriction, NAB's proposed "10/10" standard, and Hearst-Argyle's AMI proposal. Below, we discuss these proposals.

210 We do not agree with several commenters who propose that we eliminate all local television ownership restrictions.[440] As we explained above, the public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences, they do not profit by attracting existing audiences away from their other programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by viewers[441] Most commenters proposing elimination of the rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market As we explain at Section III(B) above, we do not agree with commenters who urge us to eliminate our rules and defer all competition concerns to the antitrust authorities.

211 We conclude that, as compared to the modified rule, the rule modification proposals advanced by commenters are more likely to result in anomalies and inconsistencies, or will otherwise fail to serve our policy goals. For example, by proposing that we permit common ownership of two television stations in all markets with four or more stations, Nexstar attempts to account for the differing economics of stations in small markets.[442] However, unlike our modified rule, the Nexstar proposal does not protect against combinations of the market participants with the largest audience shares, combinations that are more likely to cause competitive harms. It also permits extremely high concentration levels in the very smallest markets—there could be as few as two competitors in markets with four television stations. We find that the levels of concentration permitted by the Nexstar proposal are likely to result in harm to competition in local DVP markets

212 Similar competitive harms would result if we adopted proposals to eliminate or modify the top four-ranked standard.[443] Emmis claims that the top four-ranked standard cannot be justified on

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[439] *See generally,* Alaska Comments; Belo Comments; Duhamel Comments; Emmis Comments; Fox Comments; Granite Comments; Gray Comments; Hearst-Argyle Reply Comments; Media General *et al.* Comments; Paxson Comments, Sinclair Comments, Westwind Reply Comments.

[440] *See* Alaska Comments at 2, 6-7; Fox Comments at 2-3, 6, 33-34, 58-59, Gray Comments at 6, 19; Media General *et al* Comments at 2, 8; Sinclair Comments at i-iii, 8-9, 60.

[441] For a discussion of program provision under different market structures, *see*, Steiner, *supra* note 403; MOWG Study No 6 at 3-5, Sinclair Comments, Baumann/McAnneny Statement at 2-6

[442] Nexstar Comments at 15, 21.

[443] *See* Emmis Comments at 23-33, Fox Comments at 50; Sinclair Comments at 41-46, Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H Dortch, Secretary, FCC (May 29, 2003) ("Nexstar May 29, 2003 Ex Parte"), Letter from Gary R. Chapman, President, LIN Television Corporation, Paul H. (continued ..)

diversity or competition grounds.[444] Several commenters agree.[445] We are not relying on the top four-ranked provision of our modified local TV ownership rule to promote diversity, although we recognize that because the marketplace for ideas is broader than the DVP market, rules intended to promote competition also will promote diversity. We disagree with commenters' claims that the top four-ranked standard is not justified on competition grounds. At the time of our last review of the local TV ownership rule, we lacked sufficient record data concerning competitors to local television stations.[446] In the instant proceeding, we face no such shortage of evidence concerning which media compete with local TV. Having determined that television competes with all providers of DVP, we have crafted a rule that appropriately takes account of competition from other sources of DVP, and will ensure competition in local DVP markets We do not agree that elimination of our top four-ranked standard, use of a top three-ranked standard,[447] or use of a tiered system that would ban mergers among top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets,[448] would serve the public interest As discussed above, top four-ranked combinations are likely to harm competition in the DVP market,[449] and are less likely to produce offsetting public interest benefits.[450]

213 We believe that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where

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McTear, President & CEO, Raycom Media, Inc, Bernard E Waterman, President & Director Waterman Broadcasting Corporation, and Lara Kunkler, President and General Manager, Montclair Communications, Inc, to Marlene H Dortch, Secretary, FCC (May 15, 2003); Letter from Robert A Beizer, Vice President of Law & Development, Gray Television, Inc, to Marlene H Dortch, Secretary, FCC (May 29, 2003) ("Gray May 29, 2003 Ex Parte"), Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (May 22, 2003) ("NAB May 22, 2003 Ex Parte") (proposing a tiered approach which would prohibit top four-ranked combinations in DMAs 1-25, top three-ranked combinations in markets 26-75, and top two-ranked combinations in markets 76-210), *Duopoly Relief Needed – 4th Ranked Stations Significantly Trail 3rd Ranked Stations*, Bear Stearns (May 29, 2003) (proposing a top three-ranked standard) ("Bear Stearns May 29, 2003 Ex Parte")

[444] Emmis Comments at 23-33 Emmis states that it has a temporary waiver authorizing its ownership of two television stations in the Honolulu, Hawaii DMA. Emmis Comments at 2. The top four-ranked standard prohibits Emmis' permanent ownership of this combination

[445] *Fox Top Four Study*, *supra* note 417 (asserting that the top four restriction incorrectly seeks to promote diversity based on an unsupported assumption that top four-ranked stations are more likely to offer local news, although numerous stations that are not among the top four-ranked actually air local news); Sinclair Comments at 41-46, Exhibits 22-23 (asserting that if the intent of local TV rule is to prevent combinations involving stations that offer local news, the should do so explicitly because there is no empirical basis for view that only top four offer local news) *See also* note 446, *supra*

[446] Emmis Comments at 31-32.

[447] Bear Stearns May 29, 2003 Ex Parte

[448] NAB May 22, 2003 Ex Parte.

[449] *See supra* ¶¶ 195-200.

[450] *See supra* ¶¶ 198-199.

application of the top four-ranked restriction would harm the public interest We discuss modifications to our current waiver standard in a separate section below.

214 Belo takes a nearly opposite approach, proposing that we permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test.[451] We agree that, as it is used in our modified rule, a top four-ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct

215 NAB proposes that we permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the "10/10" proposal).[452] NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources.[453] NAB proposes that we treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which we discuss further below along with other waiver proposals.[454] NAB asserts that its proposed test would be easy for applicants to use and for the Commission to apply, would provide needed financial relief for struggling stations in small and medium markets and those that are lower-rated, and, by prohibiting combinations of leading stations, would effectuate our diversity and competition goals.[455] According to NAB, a ten viewing share effectively separates market leading stations from non-leading stations on a consistent basis across DMAs of varying size.[456] NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share above the ten threshold at the time of such transfer.[457] NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.[458]

[451] Belo Comments at ii-iii

[452] NAB Comments at 79

[453] *Id*

[454] *Id*

[455] *Id* at 79-81.

[456] *Id* 81-82 NAB further asserts that the proposal will advance our localism goal by preserving struggling stations and by enhancing stations' financial viability, which will enable them to continue or initiate local news programming *Id* at 82-83.

[457] *Id.* at 83-84

[458] Coalition Broadcasters Comments at 11-12, Desmond Reply Comments at 8; Duhamel Comments at 2, Gray Reply Comments at 6-7, Hearst-Argyle Reply Comments at 10-11; Pappas Comments at 13-15; Paxson Comments at 30-31; Westwind Reply Comments at 3. Coalition Broadcasters suggest modifying the proposal to establish a threshold share as high as 15 instead of ten for combinations in smaller markets Coalition Broadcasters Comments at 11-12. Desmond urges us to adopt the proposal but to rely on audience share data that does not include out-of-market or non-broadcast viewing. Desmond Reply Comments at 8. Gray and Paxson support the 10/10 proposal as (continued....)

216 Although it supports the 10/10 proposal, Hearst-Argyle asserts that the most important deficiency of the proposal is that there is little record support for NAB's contention that ten is an ideal "cut-off point" between leading stations and others. Similarly, UCC states that in many markets, ten is the average share for any given broadcast station, and is not a dividing line between leading and struggling stations.[459] UCC contends that NAB has not shown that all, or even most, stations with a viewing share under ten are struggling to achieve financial viability.[460] UCC asserts that, to the contrary, 10/10 will permit common ownership of top-ranked stations in many markets.[461]

217 The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. We have identified several benefits of such combinations. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. Our analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. We also agree with commenters who contend that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited For these reasons, we reject the 10/10 approach.

218. Hearst-Argyle advances an alternative proposal.[462] Hearst-Argyle's proposal would permit common ownership of any number of television stations in the same market provided that the stations' combined audience share does not exceed 30%.[463] Combinations that would result in an audience share above 30% would be subject to an Audience Market Index ("AMI") cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data.[464] If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration.[465] A combination resulting in an AMI between 1000 and 1800 would be

(Continued from previous page)
an alternative to eliminating the current local TV rule. Gray Reply Comments at 6-7, Paxson Comments at 30-31. Sinclair opposes the proposal but suggests that it could serve instead as a safe harbor Sinclair Reply Comments at 5.

[459] UCC Comments at 20-21, Exhibit 1

[460] UCC further contends that NAB has not shown that allowing such combinations will benefit the public. UCC Comments at 21, 23. UCC asserts that, to the contrary, such combinations will result in significant harm to diversity in local markets *Id* at 17-20.

[461] UCC Comments at 18, Exhibit 1. As an example, UCC states that only one station in the San Francisco, California DMA has had an average viewing share of ten or more in the past four Nielsen books, which means that, under 10/10, a single entity could combine the top two-ranked stations in the market. *Id.* Similarly, in the Washington, D.C. DMA, three of the four top rated stations have average viewing shares below or near 10. *Id.*

[462] Hearst-Argyle Reply Comments at 13-19.

[463] *Id* at 14

[464] *Id.* at 14-16

[465] *Id* at 16.

permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points.[466] Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition.[467] Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis.[468] In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

219. We do not agree with Hearst-Argyle that simply because courts have accepted presumptions of 30% market share as demonstrating market power in the context of the antitrust statutes, we should establish a presumption that 30% is an appropriate audience share limit The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations We do not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule – including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations.[469] Because of the anticompetitive harms that would result from combinations allowed by the AMI test, we will not adopt Hearst-Argyle's AMI proposal.

220 NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market.[470] For similar reasons, we do not accept this proposal. As discussed herein: (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit combinations that undermine that goal, and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. Our modified rule better effectuates our goal of promoting competition in local DVP markets.

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[466] *Id* at 16-17

[467] *Id.* at 17-18 Hearst-Argyle notes that because all viewable channels are included in its analysis, its proposal reflects competition from viewing of cable channels

[468] *Id* at 18. Specifically, Hearst-Argyle states that its 30% cap derives from Supreme Court precedent (citing *U.S. vs Philadelphia National Bank,* 374 U S 321, 364 (1963)) and notes that its AMI analysis is similar to DOJ antitrust analysis using the *DOJ/FTC Merger Guidelines*.

[469] *Id*, Appendix at 1.

[470] Letter from Edward O Fritts, President and CEO, NAB, to Marlene H Dortch, Secretary, FCC (May 28, 2003)

b. Waiver Standard

221 In our *Local TV Ownership Report and Order*, we established a waiver standard for purposes of our local TV ownership rule The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. We define a "failed station" as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[471] Our "failing" station standard provides that we will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had low all-day audience share (*i e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor;[472] and (3) the merger will produce public interest benefits.[473] Our unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so.[474] For each type of waiver, we also require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station[475] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three waiver standards at the time of transfer.[476]

222. Our rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity[477] Most commenters addressing the waiver standard urge us to relax or eliminate the standard NAB urges the Commission to evaluate, on a case-by-case basis,

[471] 47 C F R § 73 3555, Note 7 (1)

[472] We have stated that a waiver is more likely to be granted where one or both of the stations has had negative cash flow for the previous three years The applicant must submit data, such as detailed income statements and balance sheets, to demonstrate this Commission staff evaluate the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

[473] For purposes of this criterion, we also stated that at the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12939 ¶ 81

[474] *Id* at 12941 ¶ 86.

[475] 47 C F R. § 73 3555, Note 7. One way to satisfy this criterion is to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received *Local TV Ownership Report and Order*, 14 FCC Rcd at 12941 ¶ 86

[476] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

[477] *Id* at 12941 ¶ 85.

combinations that do not meet its proposed local TV ownership rule[478] For purposes of this case-by-case evaluation, NAB proposes that the Commission expand its current waiver standard to include consideration of waivers that will facilitate a station's DTV transition or maintain existing local news operations.[479] Paxson agrees[480] Pappas and NAB urge us to eliminate the requirement that the applicant demonstrate that there are no available out-of-market buyers for a subject station.[481] Coalition Broadcasters assert that the current "failing" station standard is too stringent to provide meaningful relief, and does not reflect market realities.[482] Coalition Broadcasters propose that we eliminate the current waiver standard and evaluate waivers on a case-by-case basis, considering factors such as the financial position of the station, penetration levels of other local media, levels of competition in local markets, and whether a combination will promote innovation[483] Media General *et al* urge us to allow transfer of combinations created pursuant to a waiver, even if the combination does not satisfy our local TV ownership rule or waiver standards at the time of transfer.[484] They assert that such transferability would encourage investment in failed, failing, or unbuilt stations.[485]

223. UCC opposes relaxation of the current waiver standard, asserting that the relaxation proposals advanced by NAB and others will allow for many more combinations, thereby dramatically reducing viewpoint diversity in local markets[486] UCC contends that a waiver standard connected to the DTV transition would only delay the DTV transition because it would give broadcasters an incentive to stall transitioning stations in order to qualify for a waiver.[487] CFA supports the adoption of a new case-by-case waiver standard that would allow applicants that do not meet its proposed local TV ownership restriction to obtain waivers if the Commission finds that the combination serves the public interest and if the new owner will preserve functionally separate news and editorial departments within separate

[478] NAB Comments at 79-80. *See also* Gray Comments at ii (urging Commission to establish a flexible waiver standard should it retain any local TV ownership restrictions).

[479] NAB Comments at 79-81, Pappas Comments at 14-15.

[480] Paxson Comments at 31 *See also* Gray May 29, 2003 Ex Parte (urging us to consider case-by-case waiver requests for combinations in small and medium markets).

[481] Pappas Comments at 14-15; NAB Comments at 80 n.148

[482] Coalition Broadcasters Comments at 12-14. *See also* Alaska Comments at 2-3. Coalition Broadcasters contend that the failing station standard's focus on negative cash flow is misplaced, because other factors, such as excessive debt and interest obligations, also can cause a business to fail. Coalition Broadcasters Comments at 12-13. *See also* NAB Comments at 80 n.149 (urging the Commission to eliminate the requirement to demonstrate negative cash flow). Coalition Broadcasters also contend that 4% audience share does not reflect financial viability, and that many stations with higher audience shares also are failing Coalition Broadcasters Comments at 12-13.

[483] Coalition Broadcasters Comments at 12-14.

[484] Media General *et al* Comments at 7.

[485] *Id*

[486] UCC Reply Comments at 23-26

[487] *Id* at 25-26

subsidiaries [488]

224 We conclude that tightening our waiver standard would not promote our public interest goals, as discussed below. Moreover, we agree with the NAB and other commenters who urge us to expand our waiver standard to include consideration of combinations that will yield other public interest benefits. Our treatment of waivers will follow the competition principles established in the *DOJ/FTC Merger Guidelines*, with a specific focus on the industry at hand. In particular, as in the *DOJ/FTC Merger Guidelines,* we will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules.[489] We also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas

225 First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.[490]

226. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. We conclude that the public interest benefits of activating a dark or unbuilt station, outweighs the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

227. The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules. Our new rules allow one company to own two stations in a market provided both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by diminishing competition in the DVP market.[491] However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets.[492] Therefore, we allowed station combinations that would not be permitted in larger markets.

[488] CFA Comments at 288

[489] See the *DOJ/FTC Merger Guidelines* §§ 5.1, 5 2 (discussing mergers involving a failing firm and a failing division)

[490] NAB Comments at 80 n 148.

[491] *See* ¶¶ 195-200, *supra.*

[492] NAB April 30, 2003 Ex Parte at 2, Chart 1.

However, our concern for the economics of broadcast television in small market does not lead us to relax the top four prohibition generally because we concluded that this restriction remains necessary to promote competition in the DVP market. Nonetheless, we do recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal -- but not yet "failing" -- stations from effectively serving the needs of their communities Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, we will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which we have already recognized that the economics of broadcast television justify relatively greater levels of station consolidation better serve the public interest.

228 In considering waivers of our top four-ranked restriction, we will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local stations so that we may assess the competitive effect of the merger.[493]

229 Second, we also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television Waiver applicants claiming that the merger is needed to facilitate the digital transition should provide data supporting this assertion.

230 We also will consider the effect of the proposed merger on localism and viewpoint diversity For instance, if both stations do not currently produce a local newscast, the merger is less likely to result in a reduction of viewpoint diversity than if both stations produce news. Similarly, a commitment that the merging parties will significantly increase news and local programming at one or both stations could result in a merger that increases localism and diversity from the status quo. Waiver applicants should submit information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of failing station waivers, we will require that, at the end of the merged stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. Finally, our review of waiver requests will account for the diminished reach of UHF stations. As discussed in our national television ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, we will consider whether one or both stations sought to be merged are UHF stations.

231. As explained above, our revised local TV ownership rule no longer permits combinations involving stations that do not have overlapping Grade B contours, on grounds that, because of statutory mandatory carriage requirements, most stations compete with each other on a DMA-wide basis.

[493] *See, e g* , Gray May 29, 2003 Ex Parte.

However, we recognize that certain stations are not carried throughout their assigned DMAs, and thus do not compete with each other within their assigned markets. Accordingly, we will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination (a) do not have overlapping Grade B contours; and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

232. With respect to a licensee's ability to transfer or assign a combination involving a station acquired pursuant to a waiver, we do not find support in the record for permitting such transfers where they do not comply with our rules. The transfer or assignment of such a combination must comply with our rules or waiver standards at the time an application to transfer or assign the station is filed.

c. Satellite Stations

233 Television satellite stations retransmit all or a substantial part of the programming of a commonly owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations.[494] Later, we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks.[495] More recently, we authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[496] In the *Local TV Ownership Report and Order*, we retained our policy of exempting satellite stations from our local ownership rules.[497] We believe that continued exemption of satellite stations from the local TV ownership rule is appropriate. Our satellite station policy rests on such factors as the questionable financial viability of the satellite as a stand-alone facility, and establishment of service to underserved areas. By adding stations to local television markets where stations otherwise would not have been established, the policy advances the same goals as those underlying our local TV ownership restrictions. Since these stations are licensed only if they cannot survive as standalone, independently operated stations, we find that exempting them from the local TV ownership rule will not harm competition or diversity.

d. Transferability of Combinations Under Modified Rule

234. If an entity acquires a second or third station that complies with our modified rule, it will not later be required to divest if the number of stations in the market subsequently declines below the level consistent with our outlet cap, or if more than one commonly owned station subsequently becomes a top four-ranked station in the market. The impact of such a "springing" rule would be highly disruptive to the market. Like our other rules, however, we will not ignore the public interest underpinnings at the time of a subsequent sale of the combination. Thus, absent a waiver, a combination may not be assigned or transferred to a new owner if the combination does not satisfy our local TV ownership cap at the time of the proposed assignment or transfer.

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[494] *See, e g , Authorization of UHF Stations*, 43 F.C.C. 2734 (1954).

[495] *See, e g , Meyer Broadcasting Co.*, 67 F.C.C 2d 593 (1978), *aff'd mem sub nom. Dickinson Broadcasting Corp v FCC*, 593 F 2d 1371 (D.C Cir 1979)

[496] *See Television Satellite Stations, Review of Policies and Rules*, 6 FCC Rcd 4212 (1991).

[497] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12943 ¶ 90.

B. Local Radio Ownership Rule

235. The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. Until 1992, parties were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped.[498] Although this rule effectively prevented radio station combinations from dominating a local radio market, it also prevented efficient radio station combinations from developing. As a result, in 1992, many radio stations were facing difficult financial conditions.[499] To address this concern, the Commission in 1992 relaxed the local radio ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market.[500]

236. In the 1996 Act, Congress directed the Commission to revise those limits to provide that: (1) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (3) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM), and (4) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[501] Those revisions, along with the simultaneous repeal of national limits on radio station ownership,[502] enabled greater consolidation of radio stations in local and national markets. Currently, there are, on average, approximately 10 radio station owners in local markets,[503] and the largest radio station operator, Clear Channel Communications, owns over 1200 radio stations nationwide, representing approximately 10% of the radio stations in the United States.[504] As a result of this consolidation, the radio industry today is on a stronger financial footing than it was a decade ago.[505]

[498] Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19863-64 ¶¶ 5-7

[499] *See 1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2757-60 ¶¶ 4-10.

[500] Under the 1992 rules, a party could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C.F R § 73 3555(a)(1) (1995)

[501] 1996 Act, § 202(b)

[502] *See id*, § 202(a).

[503] *See* MOWG Study No. 11, Radio Industry Review 2002. Trends in Ownership, Format, and Finance by George Williams and Scott Roberts (Sept. 2002) at 7 ("MOWG Study No. 11").

[504] *Id* at 4, *see also* http://www.clearchannel com/radio/

[505] *See* MOWG Study No 11 at 13-19

237 The local radio ownership rule has not been altered since the 1996 Act was adopted In the 1998 biennial review, the Commission concluded that the rule continued to be necessary in the public interest to preserve competition and diversity in local radio markets.[506] The Commission expressed concern, however, that the methodologies used to define radio markets and to count the total number of radio stations and the number of commonly owned radio stations in a radio market were producing irrational and inconsistent results[507] The Commission therefore decided in the first biennial review to initiate a rulemaking proceeding to consider changes to those methodologies.[508] In the 2000 biennial review, the Commission endorsed the conclusions reached in the first biennial review with respect to the local radio ownership rule[509]

238 As contemplated in the first biennial review, the Commission issued the *Radio Market Definition NPRM* in December 2000 to consider changes to the way we define radio markets and calculate the number of radio stations in a market[510] In November 2001, the Commission issued the *Local Radio Ownership NPRM,* which initiated a broader inquiry into the effect of consolidation in local radio markets and possible changes to local radio ownership rules and policies to reflect the current radio marketplace[511] These two proceedings (collectively, the "*Radio NPRMs*") are still pending and have been incorporated into this 2002 biennial review proceeding

239. We conclude that the numerical limits in the local radio ownership rule are "necessary in the public interest" to protect competition in local radio markets. We conclude, however, that the rule in its current form does not promote the public interest as it relates to competition because (1) our current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local radio markets, and (2) the current rule improperly ignores competition from noncommercial radio stations in local radio markets. To address those concerns, we modify the rule to replace the contour-overlap market definition with an Arbitron Metro market and to count noncommercial stations in the radio market; and we initiate a new rulemaking proceeding as part of this item to define markets for areas of the country where Arbitron Metros are not defined. Although we primarily rely on competition to justify the rule, we recognize that localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market; our competition-based rule, therefore, will also promote those public interest objectives We also conclude that, consistent with our focus on competition, joint sales agreements ("JSAs") will result in attribution of the brokered station to the brokering party under certain conditions.

1. Section 202(h) Determination

240 Under Section 202(h), we consider whether the local radio ownership rule continues to be

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[506] *1998 Biennial Review Report,* 15 FCC Rcd at 11090-91 ¶ 59

[507] *Id* at 11091-94 ¶¶ 61-68.

[508] *Id* at 11094 ¶ 68.

[509] *2000 Biennial Regulatory Review,* 16 FCC Rcd 1207, 1218 ¶ 32 (2001); *see also 2000 Biennial Regulatory Review,* Staff Report, 15 FCC Rcd 21084, 21145-46 (2000).

[510] *Definition of Radio Markets, supra* note 8

[511] *Local Radio Ownership NPRM, supra* note 8.

"necessary in the public interest as a result of competition" In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[512] We examine each of these public interest objectives in turn

a. Competition

241. In the Policy Goals section, we explained how the public interest is served by preserving competition in relevant media markets. Although limits on local radio ownership are generally necessary to serve public interest, we conclude that the current local radio ownership rule does not serve the public interest as it relates to competition for two reasons. First, the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets Second, the current rule fails to account for the competitive presence of noncommercial stations in a market We accordingly modify the rule to address these concerns.

(i) Product market definition

242 To measure the state of competition in radio broadcasting, we first must determine the relevant product markets in which radio stations compete and the other media, if any, that compete in those markets.[513] We conclude that radio broadcasters operate in three relevant markets: radio advertising, radio listening, and radio program production

243. *The Radio Advertising Market.* We conclude that advertisers do not view radio stations, newspapers, and television stations as substitutes.[514] A number of commenters have argued that there is little substitution between advertising on broadcast TV and newspapers. For example, CWA urges the Commission to adopt local ownership rules that treat TV, newspapers, and radio as separate local product markets [515] This conclusion is consistent with MOWG Study No.10, which found "weak substitutability" among various local media outlets for purposes of local advertising sales [516] It is also consistent with antitrust cases filed by the Department of Justice, in which it has alleged that radio advertising constitutes

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[512] *Fox Television,* 280 F.3d at 1042.

[513] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand away from the other *See DOJ/FTC Guidelines.*

[514] MOWG Study No 10 at 12, *see also United States v Jacor Communications Inc* , 1996 WL 784589, *10 (S.D. Ohio 1996) (advertisers perceive radio as a distinct advertising medium from television or newspapers); Robert Ekelund, George Ford, and John Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis,* 14 REV INDUS ORG. 239 (1999) (radio advertising constitutes a distinct market). By definition, noncommercial radio stations do not compete in the radio advertising market

[515] CWA Comments at 13-16

[516] MOWG Study No. 10 at 12 For a technical discussion of MOWG Study No. 10, see Appendix E.

a separate antitrust market.[517] Thus, at least in terms of their revenue generating "customers," radio advertising, newspaper advertising, and television advertising make up distinct product markets [518]

244. Further, other empirical studies confirm that advertisers do not view ads in newspapers and broadcast radio as substitutes. Authors Alvin Silk, Lisa Klein, and Ernst Berndt (2002) examine advertising substitution among eight media in the national markets.[519] They report only weak substitution between newspapers and other media. Reid and King (2000) conducted a study based on interviewing and surveying advertising managers in national markets and concluded that these managers did not view radio as a good substitute for other media in advertising.[520] The evidence presented in MOWG Study No. 4 also suggests that advertisers do not substitute perfectly between radio and other forms of media.[521] We acknowledge that the studies discussed in this paragraph focus on national advertising markets.[522]

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[517] *See, e g* , Complaint ¶¶ 11-14, United States v Clear Channel Communications, No 1 00CV02063 (D.D.C. filed Aug 29, 2000), Complaint ¶ 12, United States v. EZ Communications, Inc , No 1·97CV00406 (D.D.C. filed Feb 27, 1997).

[518] Various commenters have argued that other types of advertising – such as billboards and telephone directories – also are in the same product market with radio advertising. There is, however, no evidence in the record or in the academic literature to support that argument

[519] Alvin J Silk, Lisa R Klein, and Ernst R Berndt, *Intermedia Substitutability and Market Demand by National Advertisers,* REV INDUS ORG. 323-348 (June 2002)

[520] Leonard N Reid and Karen Whitehill King, *A Demand-Side View of Media Substitutability in National Advertising A Study of Advertiser Opinions about Traditional Media Options,* 77(2) J MASS COMM Q 292-307 (Summer 2000)

[521] MOWG Study No. 4, Consolidation and Advertising Prices in Local Radio Markets by Keith Brown and George Williams (Sept 2002) ("MOWG Study No 4") The authors report that increases in concentration in the radio market contributes to a modest increase in radio advertising prices. This evidence of market power suggests that advertising on radio is not a perfect substitute with advertising on other media. Dean Baker, in comments submitted by AFL-CIO, criticizes MOWG Study No. 4 for concluding that income growth was the main factor behind the sharp surge in ad prices following the relaxation of radio ownership rules. He argues that misspecification of the model may have led to understating the effects that concentration has on radio advertising prices. We do acknowledge, as Baker argues, that the authors did not include years prior to the 1996 Act that might help establish the relationship between concentration in the radio market and prices in radio advertising There is, therefore, a possibility that MOWG Study No. 4 understates the effect that ownership concentration in local radio markets has on radio advertising prices But any such understatement would only lend further support to our conclusion that radio advertising is a separate product market.

[522] *See, e g* , Clear Channel Comments, Statement of Professor Jerry A. Hausman, at 12-17. Hausman also argues that the regressions conducted in MOWG Study No. 4 did not include the prices of broadcast television, newspaper, and cable advertising and therefore the coefficients found on the measures of concentration are unreliable, that the result is not robust when other measures of concentration are used, and that the size of the coefficient that Brown and Williams report does not warrant concern As to the first point, the staff has found that the results of MOWG Study No 4 were not significantly changed when the price of broadcast television was added to the regression. We believe, therefore, that the findings presented by MOWG Study No. 4 are robust even if other media are included. As to the remaining two points, the MOWG Study's use of natural logarithms of the HHI is consistent with a widely examined class of economic models, and, although Hausman is correct that the study reports a small coefficient, we believe that a small, statistically significant coefficient is sufficient to support our conclusion of imperfect substitution between radio advertising and other markets.

Nothing has been submitted in the record, however, that suggests that local advertisers are better able to substitute between radio and other media than are national advertisers, and the studies' results are consistent with the results of MOWG Study No 10, which did examine local advertisers.

245. *The Radio Listening Market.* We conclude that radio listening is a relevant product market[523] There is no evidence that radio listeners consider non-audio entertainment alternatives (*e.g.*, reading and watching television) to be good substitutes for listening to the radio. We therefore disagree with commenters that argue that the relevant market should be broadened from radio listening to include non-audio entertainment options.[524] We also disagree with commenters who argue that the relevant product market should be broadened to include other delivered audio media, such as Internet audio streaming and satellite radio.[525] Internet audio streaming may be a substitute for broadcast radio when listening takes place while working on a computer or in a small office environment. A significant portion of audio listening, however, occurs while driving or otherwise outside of the office or home.[526] Since most people do not access Internet audio from a mobile location, we conclude that Internet audio streaming is not a substitute for broadcast radio for a significant portion of audio listening.[527] Similarly, satellite radio may be a substitute for broadcast radio for the fewer than 600,000 people that subscribe to satellite radio.[528] But the vast majority of the population does not subscribe to a satellite radio service.[529] Accordingly, we conclude that satellite radio is not yet a good substitute for broadcast radio for most listeners.

246 Preserving competition for listeners is of paramount concern in our public interest analysis. Although competition in the radio advertising market and the radio program production market indirectly affect listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming – critical inputs to broadcasters' ability to provide service to the public – it is the state of

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[523] The relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'" *United States v E I du Ponte de Nemours & Co*, 351 U S. 377, 395 (1956).

[524] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www usdoj gov/atr/hmerger/11256.htm (visited Mar 20, 2003) This approach has been referred to as the "smallest market principle."

[525] Murphy Comments in MM Docket No 00-244 at 3, Jimcar Comments in MM Docket No. 00-244 at 1.

[526] *See Arbitron, Radio Today How America Listens to Radio* (2003) at http://www.arbitron.com/downloads/radiotoday03 pdf ("*Radio Today*").

[527] *See* MMTC Comments in MM Docket No 01-317 at 13-14 n 23 ("availability of the Internet has been overstated"); MMTC Reply Comments in MM Docket No. 01-317 at 31 (Internet radio occupies only about 4% of radio listening at home and work); UCC Comments in MM Docket No. 01-317 at 9 (Internet radio, which requires the use of a computer and modem does not offer the benefit of mobility, and cannot reach the mobile users)

[528] *See supra* ¶ 127. In contrast, local radio stations reach approximately 94% of the U.S population each week. *See Radio Today, supra* note 529 at 3.

[529] UCC Comments in MM Docket No 01-317 at 11; MMTC Comments in MM Docket No 01-317 at 32.

competition in the listening market that most directly affects the public. When that market is competitive, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. Because the additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing listeners,[530] it is critical to our competition policy goals that a sufficient number of rivals are actively engaged in competition for listening audiences. Limits on local radio ownership promote competition in the radio listening market by assuring that numerous rivals are contending for the attention of listeners.

247 *Radio Program Production Market.* Radio stations seek to acquire audio programming from a variety of audio program producers. Many sellers of audio programming do not have adequate substitutes for local radio stations. The record indicates that radio stations are an important mechanism by which the American public is made aware of new music.[531] Moreover, the record suggests no reasonable alternative available to producers of radio talk shows – a type of radio programming that has become increasingly popular in the last decade.[532] To the extent that the radio stations in a local community are owned by one or a few firms, those firms could constitute a bottleneck that would impede the ability of radio programming producers to make their programming available to consumers in that community. Accordingly, we conclude that radio programming constitutes a separate relevant product market.

(ii) Geographic Market Definition

248. Competition analysis requires that we determine the relevant geographic market in which radio stations compete. There is no serious dispute that the relevant geographic market for the product markets in which radio stations compete is local: advertisers and program producers seeking to reach listeners in a local community cannot readily substitute radio stations (or any other media) that do not serve that community for the local radio stations that do. The parameters of the local market, however, have been a source of considerable debate and controversy.[533] We currently use a contour-overlap methodology for defining radio markets and determining the number of radio stations that are in those markets.[534] That methodology has been subject to intense criticism for producing unrealistic and irrational results, which in turn lead the Commission to issue two separate rulemaking notices – the *Radio NPRMs* – to examine the problems associated with the contour-overlap system in greater detail.

249. We have examined the record developed from the *Radio NPRMs* in conjunction with our overall biennial review of the media ownership rules. Based on the record and our own experience, we

[530] For a discussion of program provision under alternative market structures, see, Steiner, *supra* note 403, MOWG Study No. 6 at 3-5; and Sinclair Comments, Baumann/ McAnneny Statement at 2-6

[531] *See* Future of Music Coalition Comments, *Radio Deregulation Has It Served Citizens and Musicians*, at 61-67, AFTRA Comments in MM Docket No. 01-317 at 12-14.

[532] *See* NAB Comments in MM Docket No 01-317 at 19, NAB Reply Comments in MM Docket No. 01-317 at 8-9

[533] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

[534] See Appendix F for a more detailed explanation of the current contour overlap methodology.

now conclude that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.

(a) Problems with the Existing Radio Market Definition and Counting Methodologies

250. We currently rely on the principal community contours of the commercial radio stations that are proposed to be commonly owned to determine the relevant radio market in which those stations participate and to count the other radio stations that are in the market.[535] We first consider whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned. If no such overlap area exists, then the radio stations involved are presumed to be in separate radio markets, and the local radio ownership rule is not triggered. If one or more areas of contour overlap exist, however, the rule is triggered,[536] and we must determine whether the proposed combination complies with the limits specified in the rule.

251. We first ask how many stations a party would own in the relevant radio market (*i.e.*, the "numerator" of the fraction upon which the numerical limits in the local radio ownership rule are based). Under our current methodology, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market. In some instances, a radio station's principal community contour will overlap some, but not all, of the principal community contours of other commonly owned radio stations. In those cases, separate radio markets will be formed from the mutual contour overlaps of different subsets of commonly owned radio stations We nevertheless apply the same rule: In each of those separate markets, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market.

252. After calculating the numerator for a particular radio market, we next determine the size of the market (*i.e.*, the "denominator" in the fraction). To do this, we again rely on principal community contours. We count as being in the relevant radio market the radio stations that are included in the numerator. We add to this number every other commercial radio stations whose principal community contour overlaps the principal community contour of *at least one* of the stations counted in the numerator. The total represents the size of the market against which the number of commonly owned stations (*i e.*, the numerator) is evaluated to determine whether the proposed combination complies with the local radio ownership rule.

253. One significant problem with the current contour-overlap system is what is known as the "Pine Bluff" problem, or the "numerator-denominator" inconsistency.[537] As explained above, a party is deemed to own only those stations that are represented in the numerator, *i.e.*, stations that have mutually overlapping principal community contours. In calculating the denominator, however, any radio station

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[535] The principal community contour for AM stations is the predicted or measured 5 mV/m groundwave contour and for FM stations is the predicted 3 16 mV/m contour. 47 C.F R § 73.3555(a)(3)(i).

[536] A single AM/FM combination is always permitted. 47 C.F.R. § 73.3555(a)(2) (overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.)

[537] *Application of Pine Bluff Radio, Inc (Assignor) and Seark Radio, Inc (Assignee)*, 14 FCC Rcd 6594 (1999).

whose principal community contour overlaps the principal community contour of *at least one* of the radio stations in the numerator is counted as being in the market, regardless of who owns that station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition "in" the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all of the radio stations in the numerator.

254 The numerator-denominator inconsistency has two potential and interrelated effects that highlight the problems with our current methodology First, by counting commonly owned stations in the denominator that are not counted in the numerator, a party may be able to use its own radio stations to increase the size of the radio market and thereby "bump" itself into a higher ownership tier. Second (and more commonly), the inconsistency enables a party to own radio stations that are in the relevant radio market (as determined by our rules) without having those stations count against the party's ownership limit in that market.[538] The current system of counting radio stations thus enables a party, by taking advantage of the effects of the numerator-denominator inconsistency, to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.

255. We cannot fix the problems associated with our current methodology merely by excluding commonly owned stations from the denominator or including those stations in the numerator.[539] If we exclude commonly owned stations from the denominator, then we would be determining which radio stations are in the market based on who owns those stations, a distinction that would be both unprincipled and unprecedented in the history of competition analysis. If we include in the numerator commonly owned stations represented in the denominator, a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration.[540] Each of these proposals thus would create new "reverse" anomalies to cancel out the effects of the numerator-denominator inconsistency.

256. Our experience with the current contour-overlap methodology leads us to the conclusion that it is flawed as a means to preserve competition in local radio markets, and that we should take an entirely new approach to market definition[541] As is clear from our description of the current market definition and counting methodologies, the size of a radio market under our current system is unique to the proposed combination being evaluated. A different combination of radio stations, or the addition or subtraction of a radio station from the combination, has the potential to change the area covered by the principal community contours of the combination and, thus, to change the number of commercial radio

[538] The first effect arises from *including* commonly owned radio stations in the denominator. The second effect arises from *excluding* those stations from the numerator.

[539] This is one of the options we suggested as a remedy for the "Pine Bluff" problem if we decided to retain a contour-overlap radio market definition *See Radio Market Definition NPRM*, 15 FCC Rcd at 25077 ¶ 9.

[540] *See* Aurora Comments in MM Docket No 00-244 at 20-22, NAB Comments in MM Docket No. 00-244 at 28.

[541] In light of our analysis, we reject the various proposals that some commenters have advanced to reform the contour-overlap system *See, e g* , Main Street Comments in MM Docket No. 01-317 at 2 (proposing change to AM propagation standard); Davis Comments in MM Docket No. 01-317 at 3 (proposing change from principal community contour to interference standard)

stations that are counted as being in the market. This is a singular and unusual method for determining the size of a market. Under traditional antitrust principles, the "relevant geographic market" is used to identify the parties that compete in that market.[542] Our contour-overlap methodology, in contrast, uses the outlets of one party – commonly owned stations with mutually overlapping principal community contours – to define the local radio market and identify other market participants. This is an inherent aspect of the contour-overlap methodology that is not in line with coherent and accepted methods for delineating geographic markets for purposes of competition analysis.

257. The conceptual problems with the contour-overlap methodology have significant implications for our ability to guard against undue concentration in local radio markets. Because radio stations with larger signal contours are more likely to reach a wider audience, consolidation of these radio stations in the hands of one or a few owners increases the potential for market power in local radio markets. Yet the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market.[543] Thus, by creating this perverse incentive, the contour-overlap methodology may undermine the primary public interest rationale for the local radio ownership rule.[544]

258. Other aspects of our contour-overlap methodology also limit its usefulness in protecting and promoting competition. The method for determining which stations are in a market often does not reflect the area of true competition among radio stations We currently count a radio station as being a competitor in a radio market if its principal community contour overlaps any one of the principal community contours that form the market boundary. Those radio stations may be too distant to serve effectively either the listeners or the advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location

[542] The DOJ identifies a relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. *DOJ/FTC Merger Guidelines* § 1.21 This approach is consistent with the Supreme Court's definition of the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v Grinnell Corp.*, 348 U.S. 563, 588-89 (1966).

[543] *See, e g*, Bear Stearns Ex Parte Presentation, *A Defining Moment in Radio?* by Victor B. Miller (May 12, 2003) at 10 ("*Defining Moment in Radio*").

[544] NAB proposes to limit the contour of Class A, AM stations for determining the number of stations that comprise a radio market to a non-directional 5-kilowatt facility (Regional Class B facility). *See* Letter from Jerianne Timmerman, NAB, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2003) ("NAB Jan. 24, 2003 Ex Parte"). Class A stations usually have very large principal community contours, which results in stations being counted in the market that may be very far away from the proposed combination of stations that define the market Alternatively, NAB proposes to address the "large signal" anomaly by "excluding from the count of stations in a market any station – irrespective of service – whose transmitter site is more than 92 kilometers (58 miles) from the area of common overlap of the stations being acquired." *See* Letter from Edward O. Fritts, NAB, to Michael K. Powell, Chairman, FCC (May 23, 2003) Although either of these approaches could reduce the number of stations counted in a market, the problems with contour-overlap approaches are not limited to situations in which there is a large signal However, as explained *infra* at ¶¶ 282-286 we adopt NAB's second proposal in the interim modified contour-overlap rule to be used for stations located outside of Arbitron Metro's until the completion of the rulemaking proceeding in Docket No 03-130.

of one or more of the principal community contours of the radio stations involved.

259 The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve

260 Consistency suffers as well Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination.[545] Thus, there is no common metric that we can use to compare the effect of two different combinations on competition.[546] In fact, we cannot even rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

261. Commenters nonetheless argue that we may not alter the market definition unless we conclude that the current market definition has caused actual harm to our public interest goals.[547] We do not agree that we must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.[548]

262 We recognize that our current view differs from what we stated in 1992 when we first adopted the contour-overlap methodology for defining radio markets and counting market participants.[549] At the time, however, the numerical limits prohibited station combinations in excess of 2 AM and 2 FM stations, and imposed on top of that an audience share cap of 25% in the largest markets. Even though the problems with the contour-overlap system were present at the beginning, the effect was less evident because of the far more restrictive ownership limits. It was only after the ownership limits were substantially raised in the 1996 Act that the scope of the market distorting effects of that system became

[545] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19880 ¶ 44, *Defining Moment in Radio* at 10

[546] *See* NAB Comments in MM Docket No. 01-317 at 34 ("Utilizing a contour overlap method of market definition for competitive purposes would essentially require each applicant to submit a customized competition analysis based on the unique market created by every proposed transaction.")

[547] *See, e g.*, NAB Comments in MM Docket No 00-244 at 12-13, 28.

[548] In any event, the record does provide some evidence of potential competitive harm. MOWG Study No. 4 suggests that consolidation has resulted in an increase in advertising prices. *See* discussion of product market, Section VI(B)(1)(a)(i), *supra*. In addition, several smaller broadcasters have asserted that consolidation has created market power, which has resulted in significant harm to their ability to generate advertising revenue, to invest in improvements to radio service, and even to stay in business *See* discussion of rejection of repeal and other modifications, Section VI(B)(1)(a)(iii)(b).

[549] *See 1992 Radio Reconsideration Order*, 7 FCC Rcd at 6394-96 ¶¶ 37-43.

manifest In light of this experience, it would be irresponsible for us to leave uncorrected our market definition and counting methodology

263 In short, our experience with the contour-overlap system leads us to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve our goals. We see scant evidence in the record to lead us to a different conclusion. Some commenters correctly note that any methodology we develop may create anomalous situations in certain instances.[550] But we cannot agree that our inability to achieve perfection in every instance justifies maintaining the current system We conclude that our methodology for defining radio markets and counting market participants must be changed.

(b) Statutory Authority

264. Before explaining our modified market definition and counting methodologies, we address arguments that we lack the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, we find that argument to be without merit.

265. The Communications Act grants us the authority to "[m]ake such rules and regulations, . not inconsistent with law, as may be necessary to carry out the provisions of" the Act.[551] We also are authorized to "make such rules and regulations . . not inconsistent with [the] Act, as may be necessary in the execution of [our] functions "[552] The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest.[553] We find nothing in the 1996 Act or its legislative history that diminishes that authority [554] To the contrary, Section 202(b) contemplated that we would exercise our rulemaking authority to make the revisions to the rule that Congress required, and Section 202(h) contemplates that we will exercise our rulemaking authority to repeal or modify ownership rules that we determine are no longer in the public interest We accordingly find that we have the authority to revise the local radio ownership rule in a manner that serves the public interest

266. Some commenters nevertheless argue that the 1996 Act restricts how we may define the "public interest." They contend that Congress specifically found the levels of radio station ownership specified in Section 202(b) to be in the public interest. Because Congress has specifically spoken, the

[550] *See, e g* , Cumulus Comments in MM Docket No 01-317 at 15; Nassau Reply Comments in MM Docket No. 01-317 at 5; NAB Comments in MM Docket No 00-244 at 5; MBC Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No 00-244 at 5, Cox Comments in MM Docket No. 01-317 at 12.

[551] 47 U S C § 303(r)

[552] 47 U S C § 154(i)

[553] *See, e g., Storer Broadcasting*, 351 U.S. at 202-03.

[554] *See, e g* , *Keene Corp. v United States*, 508 U.S. 200, 209 (1993) (statutory revisions are not presumed to change the law unless "an intent to make such a change is clearly expressed") (internal punctuation omitted) *Accord United States v. Wilson*, 503 U.S. 329, 336 (1992), *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) *See also* 1996 Act, § 601(c)(1), 110 Stat. 143 (1996 Act "shall not be construed to modify, impair, or supersede Federal . law unless expressly so provided").

argument goes, we no longer have the discretion to interpret the public interest in a manner that, in purpose or effect, precludes a radio station combination that complies with the numerical limits of the current rule, as determined by the existing market definition and counting methodologies.[555]

267. We find that argument flawed. Even assuming *arguendo* the premise of the argument – that Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest – it does not follow that Congress intended that statement to remain true in perpetuity. In *Fox*, the court held, in the context of the national television ownership cap, that the numbers Congress selected "determined only the starting point" for analysis and instructed us not "to defer to the Congress's choice" of numbers in our analysis.[556] Thus, even if Congress believed in 1996 that Section 202(b) set the appropriate radio station ownership levels, *Fox* holds that we retain the authority – indeed, the obligation – to determine ourselves whether a change in the rules would serve the public interest.

268. In *Fox*, of course, the court was addressing whether we were required to defer to the ownership limits established in the 1996 Act in justifying retention of the national television ownership rule But if *Fox* correctly held that we should not defer to the 1996 Act in deciding whether a rule continues to be in the public interest, we see no statutory basis to suggest that the 1996 Act in some way prevents us from changing the way we define radio markets or count radio stations.

269. Commenters arguing against our statutory authority place great weight on the *Fox* court's holding that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."[557] We recognize that the Section 202(h) presumption requires us to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest.[558] We see no basis for such a view. Had Congress

[555] *See, e g* , NAB Comments in MM Docket No. 01-317 at 7-10; Radio One Comments in MM Docket No 01-317 at 4, Clear Channel Comments in MM Docket No 01-317 at 10; Clear Channel Comments in MM Docket No 01-317 at 2; NAB Reply Comments in MM Docket No 01-317 at 3.

[556] *Fox Television*, 280 F 3d at 1043.

[557] *Id* at 1048

[558] Cox argues that the Commission found that it lacked statutory authority to change the local radio ownership rule in the *1998 Biennial Review Report* Cox Comments in MM Docket No. 01-317 at 4. In that report, the Commission stated that tightening the ownership limits would be "inappropriate given that Congress directed the Commission to adopt these limits in 1996." 1998 *Biennial Review Report*, 15 FCC Rcd at 11091 ¶ 60 This statement does not speak to the Commission's authority; rather, it reflects the Commission's policy decision to "monitor consolidation and gather information regarding the overall impact on competition and diversity" before considering changes to the limits established by Section 202(b). *Id.* at 11088 ¶ 53. *See also Fox Television,* 280 F 3d at 1042 (noting that the Commission had adopted a "wait-and-see" approach in the *1998 Biennial Review Report*). Indeed, in the same report, the Commission concluded that it should initiate a rulemaking proceeding to consider changes to the way markets are defined and radio stations counted, finding that the current "definitions and methodologies may be undermining Congress' intent" 15 FCC Rcd at 11091 ¶ 61. The Commission would not have taken this action if it had concluded that Section 202(b) foreclosed revisions that would make the local radio ownership rule more restrictive

intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.[559]

270. Invocation of the ratification, or reenactment, doctrine does not alter the analysis.[560] Under that doctrine, Congress is presumed to have adopted the settled judicial interpretation of a statute when it reenacts that statute[561] "Congress' repetition of a well-established term [also] carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[562] The ratification doctrine may not be invoked, however, where there is no "evidence to suggest that Congress was even aware" of an agency's position.[563] It is not enough for Congress to be presumed to know the law; Congress must make an "affirmative step" to ratify the agency's position.[564]

271. We conclude that the ratification doctrine is not applicable here. We find nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Contrary to certain commenters' arguments,[565] moreover, the Commission did not acquiesce to the ratification theory in 1996 by carrying forward these methodologies without notice and comment. The Commission merely noted that the revisions mandated by Section 202(b) did not directly affect the market definition and counting methodologies in the local radio ownership rule.[566]

272. Even if the ratification doctrine could be invoked, that would not "preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute."[567] The ratification doctrine "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change," but permits changes "through

[559] *American Hospital Ass'n v. NLRB*, 499 U S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception . . . If [a statute] had been intended to place [such an] important limitation . . , we would expect to find some expression of that intent in the legislative history "), *cf Landgraf v USI Film Prods.*, 511 U S 244, 259 (1994) ("we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it").

[560] *See, e g* , Clear Channel Comments in MM Docket No 00-244 at 3.

[561] *See, e g* , *Keene Corp* , 508 U S at 208

[562] *Bragdon v Abbott*, 524 U.S. 624, 631 (1998)

[563] *Brown v Gardner*, 513 U S 115, 121 (1994) (citing *United States v Calamaro*, 354 U.S. 351, 359 (1959)).

[564] *International Union, UAW v Brock*, 816 F.2d 761, 767 (D.C Cir. 1987) (citing *SEC v. Sloan*, 436 U.S. 103, 121 (1978)). *Accord American Fed of Labor and Congress of Indus Orgs v. Brock*, 835 F.2d 912, 915-16 (D.C. Cir 1987)

[565] *See, e g* , Clear Channel Comments in MM Docket No. 01-317 at 9; Cox Comments in MM Docket No. 01-317 at 4, Cumulus Comments in MM Docket No 01-317 at 4 n 2.

[566] *Implementation of Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 ¶ 4 (1996).

[567] *McCoy v United States*, 802 F.2d 762, 766 (4th Cir. 1986).

exercise by the administrative agency of its continuing rule-making power."[568] Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine – even if properly invoked – would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

(c) Geography-Based Radio Markets

273. We describe below the modified market definition and counting methodologies we will use to determine compliance with the local radio ownership rule.[569] We conclude that a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for defining radio markets. We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations.[570] But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water,[571] people in the United States tend to be clustered around specific population centers The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets.

274. As explained below, we will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. We also establish a methodology for counting the number of radio stations that participate in a radio market.[572] We initiate below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and we adopt a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.

(i) Arbitron Metro Survey Areas

275. *Market definition.* Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets –Arbitron Metros – are Arbitron's primary survey area, which in turn are based on Metropolitan Areas (MAs) established

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[568] *Helvering v Reynolds*, 313 U.S. 428, 432 (1941) (citing *Helvering v Wilshire Oil Co.*, 308 U S. 90, 100-101 (1939)); *see also Brock*, 835 F 2d at 916.

[569] Applicants will be required to demonstrate compliance with the rule when filing applications to obtain a new construction permit or license, to assign or transfer an existing permit or license, or to make certain modifications, such as a change in the community of license of a radio station

[570] *See, e g* , Entercom Comments in MM Docket No 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 11, Viacom Comments in MM Docket No 00-244 at 3.

[571] *See, e g.*, Main Street Comments in MM Docket No. 01-317 at 4-6.

[572] We make clear that any radio station that is included in the radio market (*i e* , the denominator) under our methodology will also be counted against a station owner's ownership limit in such market (*i e.*, the numerator). We reject Viacom's argument that we should continue the numerator-denominator inconsistency in geography-based markets. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 7, 2003) at 1 ("Viacom May 7, 2003 Ex Parte").

by the Office of Management and Budget (OMB).[573]

276. The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete.[574] Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes.[575] Although NAB opposes reliance on Arbitron markets, its own study states that Arbitron's service "is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets."[576] As that study states, "all aspects of the information that Arbitron includes in these reports," including "the ways in which the markets are defined," are "driven by [the] single goal" of enabling "commercial radio stations and advertisers [to] determine the relative value of radio station airtime."[577] As NABOB succinctly states, "Radio stations compete in Arbitron markets."[578] Given the long-standing industry recognition of the value of Arbitron's service,[579] we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard.[580]

277 Several commenters have argued that Arbitron market definitions are not reliable enough

[573] MOWG Study No. 11 at 4. MAs are comprised of metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PMSAs) Metropolitan Areas 1999, Statistical Policy Office, Office of Management and Budget (OMB Metropolitan Areas). CMSAs are comprised of multiple PMSAs. In 2000, OMB revised its procedures for defining MAs. It also adopted a more generic term, Core Based Statistical Area (CBSA), to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas ("Micro MSAs") that OMB has defined for less populated areas of the country. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). OMB released the updated MA and Micro MSA list, which incorporate the data from obtained the 2000 census, on June 6, 2003 *See* OMB Bulletin 03-04, http://www whitehouse.gov/omb/bulletins/b03-04 html.

[574] NABOB Comments in MM Docket No. 01-317 at 8 *See also* Eure Comments in MM Docket No. 01-317 at 4; Inner City Comments at 3-4; North American Comments in MM Docket No. 01-317 at 4; UCC Comments in MM Docket No 01-317 at 12; NABOB *et al* Comments at 17.

[575] *See, supra* note 520.

[576] NAB Comments in MM Docket No 00-244, Attachment B, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets* by David Gunzerath, Ph D , Director of Survey Research, Research & Planning Dep't, National Association of Broadcasters (Feb 26, 2001) ("NAB Comments, Gunzerath Report").

[577] NAB Comments in MM Docket No 00-244, Gunzerath Report at 3.

[578] NABOB Comments at 18.

[579] Arbitron's predecessor was founded in 1966. NAB Comments in Docket No. 00-244, Gunzerath Report at 2.

[580] In approximately five areas, Arbitron Metros are embedded within or overlaps another Arbitron Metro. *Defining Moment in Radio* at 30. If the radio stations at issue in an application are located in such an embedded or overlap area, we will examine each Arbitron Metro separately and will not process the application unless the proposed combination complies with the local radio ownership rule in each Metro implicated by the proposed combination We believe this approach comports with our general recognition that Arbitron's market definitions are the recognized industry standard We reject Bear Stearns' proposal that we apply a different test for these markets in which permissible ownership levels would be based on the size and the business plan of the particular group owner. *Id* at 31-32. We believe such a scheme would be inconsistent with our general reliance on Arbitron's market definition and cumbersome to administer.

for us to use as a radio market definition.[581] Although Arbitron Metro boundaries do occasionally change, we are not convinced that such changes occur with such frequency, or that they are so drastic, that we must reject reliance on those boundaries in defining the relevant radio markets. Indeed, as Bear Stearns states, the "self-correcting" nature of Arbitron Metros can be a useful tool for keeping up with "the reality of the marketplace."[582]

278. We believe, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, we will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets). Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section below, unless that change has been in effect for two years. We also will not allow a party to receive the benefit of the inclusion of a radio station as "home" to a Metro unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years.[583] We believe these safeguards will ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.[584]

279 *Counting Methodology*. For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum audience share in the Metro. Some of these stations are designated by Arbitron as "home" to the Metro. These "home" radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro These radio stations are also known as "above-the-line" stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations – known as "below-the-

[581] *See* NAB Comments in MM Docket No 01-317 at 35; Cumulus Comments in MM Docket No 01-317 at 24-25, Cumulus Reply Comments in MM Docket No 01-317 at 4, WVRC Comments in MM Docket No. 00-244 at 24, Viacom Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 00-244 at 16-17; Entercom Comments in MM Docket No 00-244 at 6, Cumulus Comments in MM Docket No. 00-244 at 5; Aurora Comments in MM Docket No 00-244 at 8, ARD Reply Comments in MM Docket No. 00-244 at 1; Idaho Wireless Comments in MM Docket No 00-244 at 6; Brill Comments in MM Docket No 00-244 at 2, Aurora Comments in MM Docket No 00-244 at 10

[582] *Defining Moment in Radio* at 11 Changes in Metro boundaries can occur as a result of population shifts *Id.* In addition, Arbitron may add a county to a Metro if 55% of the county's radio listening is within the proposed Metro, 15% of the county's residents commute into the proposed Metro, and 75% of Arbitron subscribers agree to the proposed change *Id* We believe these standards will help protect against sudden, drastic changes in Arbitron Metro boundaries

[583] Similarly, a party may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application. For an explanation of "home" status, see the following paragraphs regarding the counting methodology for Arbitron Metros

[584] To the extent, of course, that we determine that, despite these safeguards, an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule, we can and will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits.